come together in a big group from Selangor, over 150 kilometers away, but they have also ostensibly displayed on large banner, words announcing their common identity as belonging to the same party which had organized the event, as well as the purpose of the trip.

These are very relevant facts which the learned President could have, but did not consider.

Proof on (iii) above, *i.e.*, that no licence had been issued in respect of the event was preferred by the prosecution but dismissed by the learned President on the false assumption that no licence was needed for what he termed as "the walk and jog sporting event where it does not require a licence".

Evidence on (iv) is related to the intention or knowledge of a person. Proof of such intention, except where spoken out by the person himself, must necessarily come from inference drawn from the conduct of the parties and circumstances surrounding the case. The intention on the part of the respondents that they were attending the "Save Bukit China" event organized by the D.A.P. is not disputed and is manifested in the banner on the bus itself which reads "Members of D.A.P. Selangor to join the big walk". Proof of knowledge that the assembly was unlicenced on the other part could have been inferred from the conduct of the respondents themselves. The trial Court could have considered and drawn the necessary inference as to whether members of an organization could have access to the knowledge that no licence was obtained. Again assuming that they did not avail themselves to this knowledge, did it not become obvious to them when they were stopped and disallowed to proceed by the police? Even if it had not appeared so to them, and they did not care to find out, then the moment they were warned by the C.P.O. to the effect that they were taking part in an unlawful assembly, their knowledge became inferrable. This intimation of knowledge was further substantiated by the conduct of one of the respondents when she refused to obey the order and challenged the C.P.O. to arrest them.

On the premises of what I have said earlier this appeal succeeds. The order of acquittal and discharge made by the learned President is set aside.

Looking at the grounds of judgment in its entirety I am of the view that the learned President allowed himself to be unduly influenced by the "walk and jog" name which the organizer had given to this event. On that assumption alone he completely shut out from his mind and brushed aside all considerations of law, fact and surrounding circumstances which are extremely crucial towards a fair determination of this case. A bare dissimulation of an organized event, not entirely recreative in nature, with a sporting name does not make it less reprehensible under our laws relating to public order and unlawful assemblies. A hasty recognition of all sporting events as lawful, without examining its implicative purposes, will negate the object and purpose of section 27(5) of the Police Act and deprive the police of its indispensable authority to prevent public disorder.

As the failure of justice in this case arose out of substantial misapplication of law and facts, I do not consider it fair for the case to be further heard by the same President. Accordingly the case is remitted for re-trial before another Magistrate.

The respondents shall immediately hereafter appear before the Magistrate's Court and be released on entering into the appropriate bonds to appear and be re-tried in accordance with the law.

Order accordingly.

Solicitors: *Karpal Singh & Co.*

PAVONE v. PUBLIC PROSECUTOR (No . 2)

[A. Cr. J. (V.C. George J.) September 3, 1985]
[Penang – Criminal Appeal No. 45 of 1985]

Criminal Law and Procedure – Charge of trafficking in dangerous drugs – Difference in findings of field test and findings of chemist – Difference unexplained – Chain of prosecution evidence broken – Cavalier manner of handling exhibits.

Dangerous Drugs – Expert testimony – Exhibits – Handling of – Differences in findings of field test and that of chemist – Missing links in chain of evidence.

In this case the appellant was charged on a retrial with trafficking in dangerous drugs to wit 412 grammes

of heroin. The appellant was found on August 7, 1982 to have tied round his waist under his clothes a cloth satchel sewn into which was a plastic packet containing a quantity of beige-coloured powder. The appellant was detained and the satchel and its contents were taken to the police station at the Airport. An Officer from the Drug Enforcement Unit was informed of the arrest and he arrived at the Police Station and carried out what he called a field test on the powder. The satchel and its contents were left with the Police Constable who gave them for safe keeping to a sergeant, the officer-in-charge of the Police station. On the next day August 8, 1982 the Police Constable and the Officer-in-charge handed over the satchel and its contents to the Investigating Officer. On the next day again, August 9, 1982, the Investigating Officer had the satchel and its contents packaged and sealed and sent to the Chemist. The tests carried out in the Chemistry Department showed that the packet contained heroin. At the original trial the officer from the Drug Enforcement Unit who conducted the field test had stated that the contents of the packet was opium. At the retrial in his evidence he said that the contents of the plastic packet showed a positive reaction indicating the substance was an opiate.

At the original trial the appellant was found guilty but on appeal a retrial was ordered (see [1984] 1 M.L.J. 77). At the retrial the appellant was found guilty and sentenced to life imprisonment and whipping. He appealed.

Held: (1) it was clearly incumbent on the prosecution to have expert testimony explaining the patent difference in the findings of the officer from the Drug Enforcement Unit and of the Government Chemist. If indeed there was a nexus between opium, an opiate and heroin then expert testimony should have been adduced to show just that. The absence of such testimony has resulted in a significant gap in the prosecution case;

(2) in a serious case such as this the exhibits should have been packed and sealed by each of those who handled the exhibits. The exhibits were handed to the officer in charge of the station for safe-keeping but no steps were taken to ensure that the exhibits were not tampered with. No evidence was led as to where the exhibits were kept until they were handed to the Investigating Officer during the afternoon of the next day. No evidence was led as to what the Investigating Officer did with the exhibits before he finally packed and sealed the package;

(3) in the light of the patent and unexplained difference in the finding of the officer conducting the field test and that of the Chemist, the cavalier manner in which the exhibits were handed becomes significant and in all the circumstances obtaining in this case amount to missing links in the chain of evidence;

(4) although the accused appeared to have been caught red-handed there has been more than one material gap in the prosecution case and therefore the appeal must be allowed.

Cases referred to:

(1) *Pavone* v. *Public Prosecutor* [1986] 1 M.L.J. 72.
(2) *Brij Bhushan Singh* v. *Emperor* A.I.R. 1946 P.C. 38.
(3) *Mamand* v. *Emperor* A.I.R. 1946 P.C. 45.
(4) *Sia Soon Suan* v. *Public Prosecutor* [1966] 1 M.L.J. 116.

CRIMINAL APPEAL.

Karpal Singh for the appellant.

Mohamed Bazain bin Idris, (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

V.C. George J.: At about 6.00 p.m. on August 7, 1982 Police Constable Wan Mohd. Khir bin Wan Ismail was on duty at Bayan Lepas International Airport Penang when he carried out a body search on one Sebastiano Robert Pavone, an Australian national who was about to board flight SQ 193 to Singapore and discovered that the traveller had tied round his waist under his clothes a cloth satchel sewn into which was a plastic packet containing a quantity of beige-coloured powder. Pavone was detained and he and the satchel and its contents were taken to the Police Station at the Airport. One ASP Fariddin bin Datuk Ahmad of the Drug Enforcement Unit, Penang was informed of the arrest and he arrived at the Police Station at about 9.00 p.m., and carried out what he called a field test on the powder. He then went home. The satchel and its contents were left with the Police Constable who gave them for "safe keeping" to Sgt. Ahmad Nawawi the officer-in-charge (OCS) of the Police Station. Pavone was detained at the Police Station.

On the next morning, the 8th, ASP Fariduddin was instructed to take over the case as investigating officer. Accordingly, at about 3.15 p.m. on that day the Police Constable Wan Mohd. Khir and the OCS attended on him at his office and handed to him the cloth satchel and its contents as well as certain personal effects of Pavone. Pavone was also given into the custody of the ASP.

On the next day, August 9, at about 11.00 a.m. the ASP had the satchel and its contents packaged and sealed and sent to Encik Sim, a Chemist at the Government Chemistry Department, for tests to be carried out which tests revealed that the plastic packet in the cloth satchel contained 1105 grammes of an off-white substance of which 402 grammes was the drug heroin.

Pavone was charged with the offence of trafficking in dangerous drugs to wit the 402 grammes of heroin. He was convicted but successfully appealed against the conviction. The conviction was set aside and a retrial was ordered. He was tried again for the same offence and was again found guilty and was convicted and sentenced to imprisonment

for life and was ordered to be whipped with 8 strokes of the rattan. He appealed against the whole decision.

In his testimony ASP Fariduddin had said that the field test carried out by him on the contents of the plastic packet showed a positive reaction indicating that the substance was an opiate. He explained that anything derived from opium is an opiate. He also said that by the tests carried out by him it was neither possible to classify the drug nor assess its concentration.

Now it turned out that at the earlier trial of Pavone, Fariduddin was recorded as having used the word "opium" instead of "opiate". Fariduddin however insisted that in the earlier trial too he had used the word "opiate". The learned President trying the case in the second trial refused to allow the defence to impeach the credit of the witness holding that whether the witness had used the word opium or opiate was not material. He took the view that nothing turned on that in that in his opinion ASP Fariduddin was in no position to say with authority what the contents of the plastic packet was.

Before me, Encik Karpal Singh complained bitterly at the President's refusal to go through the procedure of impeaching the credit of ASP Fariduddin.

For reasons different from what the learned President had in mind I too would have refused the application to go through the procedures of impeaching the credit of the ASP.

In my view the result of the test carried out by ASP Fariduddin could not be dismissed out of hand in the manner the learned President dismissed it. The ASP was a senior Police Officer attached to the Drug Unit which obviously is a specialised unit. He had been trained to carry out field tests on substances suspected of being dangerous drugs. A field test kit and the relevant manufacturers instructions manual that went with the kit were produced as exhibits by the prosecution. The instructions manual has stated on it in bold letters the legend "The only narcotic field identification kit that can eliminate false positives". With that was the ASP's testimony that the tests carried out by him gave a positive reaction – indicating that the substance was or contained an opiate according to his testimony at the second trial or to go by the record in his earlier trial (which one should not) – a statement used for impeaching credit of a witness cannot be used as substantive evidence – see the ruling by Edgar Joseph Jr. J. in *Pavone* v. *Public Prosecutor*[1] where reference was made to *Brij Bhushan Singh* v. *Emperor*[2] and *Mamand* v. *Emperor*[3] – indicating that the substance was or contained opium. As has been seen, the Government Chemist who carried out presumably more sophisticated tests and analytical procedures testified that the contents of the plastic packet weighed 1105 grammes of which 402 grammes was heroin.

The prosecution did not get either the Chemist or the ASP or anybody else to explain what appears to be a difference in opinion of what that plastic packet contained. Was it opium or an opiate or heroin? Perhaps it is not incorrect to call opium an opiate and perhaps heroin is an opiate and then again it may not be? It was clearly incumbent on the prosecution to have expert testimony explaining that patent difference in the findings of the ASP and of the Government Chemist. If indeed there was a nexus between opium, an opiate and heroin then expert testimony should have been adduced to show just that. The absence of such testimony has resulted in a significant gap in the prosecution case. The gap serves to focus attention to some pretty shoddy investigations on the part of the Police. The street value of the off-white (or beige or brownish) substance that later turned out to be 1105 grammes in weight, if it turned out to be a dangerous drug, would have been substantial. It boggles the mind to learn that the suspect substance was left in the custody of a mere Police Constable. The exhibits were handed to the OCS for safe-keeping but no steps were taken to ensure that the exhibits were not tampered with. No evidence was led as to where the exhibits were kept until they were handed to the ASP during the afternoon of the next day. No evidence was led as to what the ASP did with the exhibits before he finally packed and sealed the package. I would have thought that in a serious case, as a matter of course, the exhibits would have been packed and the packages sealed by each of those who handled the exhibits. The ASP finally getting down to packaging and sealing the exhibits on the 9th seems to me to amount to a shutting of the stable doors after the mare had bolted.

In the light of the patent and unexplained difference in the findings of the ASP in conducting the field test and that of the Chemist, the cavalier manner in which the exhibits were handled becomes significant and in all the circumstances obtaining in this case amount to missing links in the chain of evidence.

In *Sia Soon Suan* v. *Public Prosecutor*[4] the Federal Court found that a link in the chain of the prosecution evidence was broken and had not been repaired. There, Ong Hock Thye then acting C.J. found reasons to exonerate the Police from blame for the flaws that developed in the prosecution case. I regret that I can find no such reason in this case. Ong Hock Thye Ag. C.J. went on to state:

"Nevertheless the requirements of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether this Court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else."

In the instant case although the accused appeared to have been caught red-handed there has been more than one material gap in the prosecution case. The appeal has to be allowed.

In hearing the appeal I had insisted that what transpired in the first trial and in the appeal from that trial is not relevant. But the question that has now risen is whether I should order yet another retrial. I considered that to arrive at a decision on that it would be relevant to find out, *inter alia,* what had happened earlier. I read the judgment of my brother Edgar Joseph Jr. and was startled to find the appeal was allowed by him because of the identical flaws that I have found in the prosecution case in the second trial. Although the prosecution were given a second bite they chose not to repair the break in the chain! In the circumstances there is no call to give the prosecution yet another opportunity to repair the break. That would amount to an injustice.

I allow the appeal and quash the conviction and sentence. The accused is discharged.

Exhibits to the Police for disposal.

Appeal allowed.

Solicitors: *Karpal Singh & Co.*

BANK BUMIPUTRA MALAYSIA BHD. & ANOR. v. LORRAIN ESME OSMAN

[O.C.J. (Zakaria Yatim J.) September 11, 1985]

[Kuala Lumpur – Civil Suit No. C 138 of 1985]

Practice and Procedure – Substituted service – Defendant outside jurisdiction – Defendant left country to evade service – Application to set aside order for substituted service dismissed – R.H.C. 1980, O.62 r.5(1) & O.41 r.5.

Practice and Procedure – Affidavit not disclosing source of information – Court cannot rely on such information – R.H.C. 1980, O.41 r.5.

In this case the defendant applied to have the order for substituted service on him set aside. The plaintiffs filed their writ of summons against the defendant but although every attempt to serve the writ on the defendant at his known address was made this was without success. The Senior Assistant Registrar granted an order for substituted service. Counsel for the defendant claimed that his client had left the country two months before the writ was issued and therefore the ordinary writ for service within jurisdiction should not be allowed to be served by way of substituted service. The plaintiffs did not admit that the defendant was out of the country on the date of the issue of the writ and submitted that the onus was on the defendant to show that he was out of Malaysia on January 10, 1985. It was submitted further that even if the defendant was not within the jurisdiction on the date of the issue of the writ, the defendant was evading service and the court should order substituted service.

Held: (1) the defendant had not discharged the onus to show that he was out of Malaysia on the date of the issue of the writ and the application should be dismissed on this ground alone;

(2) even if the defendant had left the country and was out of jurisdiction when the writ was issued, he did so in order to avoid service of the writ and on this ground too the application should be dismissed.

[**Editorial Note**: The decision of Zakaria Yatim J. in this case was upheld by the Supreme Court on November 1, 1985 *vide* Supreme Court Appeal No. 232 of 1985. For earlier proceedings see [1985] 2 M.L.J. 236.]

Cases referred to:

(1) *Fry* v. *Moore* (1889) 23 Q.B.D. 395, 397-398.
(2) *Wilding* v. *Bean* [1891] 1 Q.B. 100.
(3) *In re Urquhart* (1890) 24 Q.B.D. 723, 725.
(4) *Johannes Koplan* v. *Aw Chen* [1970] 1 M.L.J. 220, 221.

CIVIL SUIT.

T. Thomas for the plaintiffs.
Jeffrey Fernandez for the defendant.

Cur. Adv. Vult.